

CAREY HOROWITZ
RIVER RUNNERS, LTD.

IBLA 93-621, 93-647

Decided March 12, 1997

Appeals from a joint decision of the Royal Gorge Resource Area Manager, Bureau of Land Management, and the Arkansas Headwaters Recreation Area Park Manager, Division of Parks and Outdoor Recreation, Colorado Department of Natural Resources, approving a rationing plan for commercial boating use and from a joint decision of the District Manager, Canon City District Office, Bureau of Land Management, and the Manager, State of Colorado Division of Parks and Outdoor Recreation, South Region, rejecting objections to the rationing plan.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Land Use Planning

A joint BLM and State decision developing a rationing plan for commercial boating use in accordance with the directives of a recreation management plan amending a management framework plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal. Unsupported differences of opinion provide no basis for reversal.

APPEARANCES: Carey Horowitz, Denver, Colorado, pro se; Pete Cordova, Esq., Salida, Colorado, for River Runners, Ltd.; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Carey Horowitz, d.b.a. Voyageur Adventures (Horowitz), has appealed for the June 30, 1993, decision of the Royal Gorge Resource Area Manager, Bureau of Land Management (BLM), and the Arkansas Headwaters Recreation Area (AHRA) Park Manager, Division of Parks and Outdoor Recreation (DPOR), Colorado Department of Natural Resources, approving the rationing plan for commercial boating use of the AHRA. River Runners, Ltd., has appealed from the August 13, 1993, decision of the District Manager, Canon City District Office, BLM, and the Manager, DPOR South Region, rejecting River Runners' objections to the rationing plan. By order dated October 13, 1993, we granted BLM's request to consolidate these two appeals.

BLM and DPOR developed the rationing plan in accordance with the directives of the Arkansas River Recreation Management Plan (ARRMP) approved with slight modifications by the State Director, Colorado State Office, BLM, on October 27, 1989, as an amendment to the 1979 Royal Gorge Management Framework Plan (MFP). The ARRMP established the seasonal carrying capacities of the various segments of the upper Arkansas River from Leadville to Pueblo, Colorado, for both commercial and private use (ARRMP at II-5, Illustration II-1) and identified the conditions which would trigger indirect and direct controls over use of the river (ARRMP at II-23 through II-25). Specifically, the ARRMP, as modified by the State Director's October 27, 1989, decision, provided that

when use in any segment reaches 75 percent of prescribed capacities on more than five days per season, [BLM will] initiate a user education effort explaining that capacities are being reached and encouraging use of other river segments offering similar types of recreation in order to postpone direct use regulation as long as possible.

* * * * *

Whenever use on any one river stretch exceeds 75 percent of capacities established for the commercial or private sector five times in any one season, BLM and DPOR will begin to determine how allowable use will be assigned within that sector. This determination will be made:

According to then current BLM public lands policies,

As an addendum (not amendment) to this plan,

With opportunity for public and Advisory/Task Force review and comment provided,

Including assignment of launch times and group/party size specifications as appropriate.

Whenever use on any one river stretch exceeds 75 percent of capacities established for the commercial or private sector five times in any one season, BLM and DPOR, utilizing the most recent studies and monitoring data available, will assess the need for establishing different carrying capacities on weekdays vs. weekends and holidays. It is expected that weekday capacities would be considerably lower than those for weekends and holidays. [1/]

^{1/} The State Director added this paragraph in response to issues raised in protests received on the draft ARRMP. See State Director's Oct. 27, 1989, Decision at 1 and 2, ¶ 8.

Exceeding prescribed carrying capacities more than five times in a season will trigger use allocation the following year for the affected stretch of river. Use allocation will be applied only to the user group that exceeded capacities. [2/]

The allocation system may be discontinued at the discretion of BLM and DPOR:

If demand falls short of available capacity for two consecutive seasons for any river stretch,
or

If, through improved utilization of key access sites or the river corridor itself, it is determined that capacities established in this plan need to be raised and the plan is amended.

(ARRMP at II-23 through II-24, as modified by Oct. 27, 1989, Approval Decision at 2, ¶ 8 and 9). The ARRMP also prescribed the imposition of limitations on the maximum number of boats per group and launches per segment concurrently with the implementation of use allocations in order to reduce crowding and congestion, promote visitor safety, and enhance resource appreciation and specifically prohibited any sector of the boating population, whether private or commercial, which had reached its prescribed carrying capacity from appropriating unused capacity from the other sector (ARRMP at II-25).

Although the ARRMP did not delineate the procedures for implementing rationing, it indicated that BLM policy already contained guidance on how to make use allocations once carrying capacities had been reached and indirect measures to accomplish management objectives had been exhausted (ARRMP at I-15 through 16). The identified criteria governing all allocation systems included:

- 1) Manageability: Allocation methods must be workable, implementable, defensible to users, and within legal and budgetary constraints;
- 2) Flexibility: The method used must be responsive to the relevant amount of use and to demand shifts;
- 3) Fairness and Equity: The method must be equitable and fair to the greatest extent possible and to all concerned;
- 4) Maximization of experiences and allowable use; and
- 5) Minimization of resource impacts and user conflicts.

^{2/} This last sentence was added by the State Director in his approval decision. See State Director's Oct. 27, 1989, Decision at 2, ¶ 9.

(ARRMP at I-16). See also BLM Manual Section 8372.06.E.

The ARRMP also described three acceptable, but not exclusive, allocation methods authorized in BLM Handbook H-8372-1:

- 1) Lottery: After applicants are screened to meet minimum standards, such as safety and past performance, those remaining applicants may be awarded a permit by a lottery system;
- 2) Historical Use: Assign the number of user days according to historic use records. This is defined as the average of the highest two seasons in the preceding 5-year period; and
- 3) Competitive System: After standards for desired services are established, invitations to submit proposals (either by open bid or matching bid) are extended to all operators. The proposals are then evaluated against the standards. * * * Those who rank the highest are awarded a permit and a specific number of user days.

(ARRMP at I-16). 3/

Because the ownership of lands adjacent to the river consisted of a patchwork of Federal, State, municipal, and private interests, the ARRMP specified that implementation of the plan and management of recreational use of the Arkansas River corridor would be a cooperative venture between BLM and DPOR, with DPOR assuming the role of primary, on-the-ground recreation manager pursuant to a cooperative management agreement (CMA) to be developed upon plan approval. See ARRMP at I-1, I-5, I-13 through 14. The ARRMP explained that DPOR had the authority to regulate the manner, type, time, location, and amount of recreational use on the affected corridor of the river under the recently enacted provisions of the Arkansas River Recreation Act, Col. Rev. Stat. §§ 33-12.5-101 through 105 (1993 Cum. Supp.) (ARRMP at I-13 and Appendix E). The CMA formalizing the cooperative partnership between BLM and DPOR for the management of the public land resources of the Arkansas River corridor and identifying DPOR as the lead agency in the management of recreation on public lands and related waters in the AHRA was signed by the Governor of the State of Colorado, the Director, BLM, and the Colorado State Director, BLM, on October 27, 1989. Both BLM and DPOR agreed in the CMA to work together to allot and ration river use as specified in the ARRMP. See Sections III.A.6 and III.B.2, CMA at 4.

3/ The Handbook also summarizes the "common pool" allocation method for assigning or adjusting use during the season when a permittee cannot use assigned user days, explaining that the permittee can return the unused days to a common pool for allocation to others. See BLM Handbook H-8372-1 at II-3.

Pursuant to the provisions of the ARRMP and CMA, BLM and DPOR advised the public that the 1991 outfitted boating use in the AHRA had reached 75 percent of capacity five times in Browns Canyon, twice in Royal Gorge, and once in The Numbers and had exceeded capacity twice in Segment 3, thus triggering the agencies' obligation under the ARRMP to begin determining use allocation methods for the affected sectors, and requested public input in the development of a rationing plan for commercial use of the river. See Undated Public Handout Contained in the Case File. After holding four public scoping meetings to identify issues and concerns, considering comments received during the development of the draft plan, ^{4/} consulting with the AHRA Citizen Task Force and the Outfitter Rationing Committee, evaluating comments on the draft plan, making presentations to and accepting suggestions from the Colorado State Parks Board and the BLM Canon City District Advisory Council, BLM and DPOR issued their June 30, 1993, decision approving the final rationing plan for commercial boating use of the AHRA and making a corresponding addendum to the ARRMP. The decision explained that the plan provided direction for making commercial use allocation decisions in the AHRA and that on-the-river application of the rationing methodology would occur as each section of the Arkansas River reached the threshold levels for rationing established in the ARRMP.

The plan defines the allocation methodology to be implemented the year following the year in which capacities have been reached more than five times in any specific subsection of the river, explicitly clarifying that rationing will be limited to only those subsections and days where capacities have been met and that calculations for rationed use will separate weekends and holidays from weekdays (Rationing Plan at I.A.1-3). Historic use forms the foundation for the allocation calculations:

Historic use will be based on the average of the use occurring on the high two of the most recent five years for the days being rationed in the section being rationed. (If at the time of implementation there are not five years of records, we will use the high two years of those years for which records are available.)

In the event that the average use occurring on the high two of the most recent five years for the days being rationed is greater than 100% of capacity, additional years (3rd highest, 4th highest, 5th highest) will be added and averaged until averaged use equals 100% of capacity. * * *

Including 1993 data, there are three years of sufficiently detailed data to calculate historic use. Depending on how soon rationing is necessary, it may not be possible to utilize five years.

^{4/} The record before us does not contain a copy of the draft plan although the case file does include public comments on that plan and the final plan.

Should this occur, the number of days of historic use available will be used to get as close to 100% capacity as possible. Each outfitter will then be reduced equally by the percentage necessary to reduce total use to the required 100% capacity.

Example: total rationed use of all outfitters after averaging user days is 110% of capacity. Every Outfitter would be reduced equally so that rationed use equals 100%.

In the event that the average use occurring on the high two of the most recent five years is less than 100%, each outfitter will be increased equally by the percentage necessary to increase total use to 100% of capacity.

When mathematical calculations are made to perform this averaging, all fractions, or parts of a boat, will be rounded up.

(Rationing Plan at I.A.4).

The plan addresses the recalculation of rationed use and the redistribution of unused days:

Rationed use figures will be recalculated every three years, utilizing the last three years. Use on Rationed days within 80% of the rationed amount 2 out of 3 years will be counted as 100% use for recalculation purposes.

When mathematical calculations are made to perform this averaging, all fractions, or parts of a boat will be rounded off (.49 round down, .50 round up).

Upon recalculation, unused days will be distributed by dividing the number of unused boats for each day by the number of Outfitters within that subsection who are interested. Each participating Outfitter will then be issued that number of boats. If the number is less than 1 boat per Outfitter, a lottery will be held among these Outfitters with the number of boats available distributed one at a time to lottery winners.

Recalculation provides opportunities for growth by equitably redistributing any unused boat days that may exist. Redistribution of unused days will be announced and completed prior to the boating season.

(Rationing Plan at I.A.5). To prevent extremes in flow conditions from unduly influencing historic use, the plan identifies circumstances under which a boating season will be excluded for recalculation purposes. See Rationing Plan at I.A.6.

The plan defines a "boat day" or "user day" as any part of 1 day utilized by either a boat or a person and clarifies that a user or boat day will be counted for whatever portion of a day a boat or guest is in any subsection of the river without distinguishing quarter, half, and full day trips (Rationing Plan at I.A.7). In order to prevent companies from trying to obtain unwarranted historic use, the plan considers both boats per day and people per day:

Implementation of rationing will be triggered when the number of boats per day exceeds the capacities detailed in the [ARRMP]. When this occurs, rationing will be defined as both boats per day and people per day, equalling eight people per raft including the guide. For kayaks, inflatable kayaks, 2-seat catarafts, and canoes, the number equals two people per boat.

In the year that days reach capacity and must become rationed the following year, the number of people/boat a company has that year must be within 80% of that company's historic people/boat average, in each respective subsection. For 1993, this will be based on 1991 and 1992 use figures. For every year thereafter, this will be based on the immediately preceding three years. Should the people/boat average on this day be less than 80% of that company's people/boats historic average, the number of boats on that day will be reduced, for rationing calculation purposes, by that same amount.

This calculation will reduce speculation by companies that may try to increase the number of boats without an increase in business for purposes of obtaining historic use.

(Rationing Plan at I.A.8).

After explaining that the flat across-the-board people per boat figure approximates actual usage while allowing for a small increase in the overall number of people with the number of boats remaining constant, the plan continues:

For purposes of recalculation, boats will be the primary index. The total number of people an outfitter may take will be determined by multiplying the rationed numbers of boats time [sic] 8. (Example: 10 boats x 8 people per boat = 80 people, or 10 kayaks, inflatable kayaks, 2-seat catarafts, or canoes x 2 = 20 people.) Within legal restraints, an Outfitter may load boats as they wish. However, an Outfitter may not exceed their rationed number of boats in a rationed day, or that number of people. Numbers may not be interchanged between types of boats.

If only "boats" were used to identify use, use capacities could significantly increase because there are companies using kayaks and inflatable kayaks. These boats could be changed to rafts, and the number of people on the river could increase dramatically.

If only boats were used to identify use, use capacities could increase significantly if legal people per boat loading capacity were reached. The legal loading formula is the length of boat divided by 2, plus 2, plus the guide. The legal load for a 16-foot boat is 11 people.

If only "people" were used to identify use capacities, the number of boats on the river could dramatically increase. This could lead to exceeding the boats per day capacities set in the [ARRMP].

(Rationing Plan at I.A.8).

The plan reiterates the statement in the ARRMP that rationing may be discontinued if demand falls short of available capacity for two consecutive seasons in any river section (Rationing Plan at I.A.9). The plan also subdivides one subsection of the river (Rationing Plan at I.A.10), reduces commercial weekday use on two sections of the river by 20 percent (Rationing Plan at I.A.11), and limits trip size to no more than 10 boats while requiring a 300-foot spacing between trips by the same company (Rationing Plan at I.A.12).

The plan provides one exception to the general prohibition against outfitters with no historic use on rationed days operating on those days:

Sharing rationed boat and/or user days will be permitted on a trial basis with the following requirements: On a form provided by AHRA managers, the Outfitter loaning their rationed boat and/or user days for that day will state who the days are being loaned to, how many boat and/or user days are being loaned, the date, the subsection(s) involved, and sign and date the form. The receiving Outfitter must sign and date the form also.

This form, signed by both Outfitters, is due from the Outfitter who borrowed the use on November 1st with Post Use Reports. A separate form is required for each loan of boat and/or user days. In addition, this information must be telephoned into the AHRA office the day sharing arrangements are made.

The Outfitter loaning the rationed boat and/or user days will receive historic use credit for the days loaned as long as they are used. Days borrowed but not used will be subtracted from the use figures of the company borrowing the use. Boats utilized for borrowed user days will be clearly marked as belonging to the Outfitter borrowing the user days.

Violations of this provision will result at a minimum in additional fees assessed in the amount of \$100 for each occurrence.

Use on rationed days may be shared only within the subsection that they are rationed for and only among companies having use on any day in that subsection.

Sharing rationed user days may prove to be too complicated in terms of reporting by Outfitters and recording by AHRA managers, as well as in verification of use. The apparent advantages[,] the flexibility to provide maximum services to guests, opportunity for smaller companies to better schedule for their trip needs, and full utilization of rationed use make this worth trying. If it does not work this provision will be removed from the Rationing Plan.

(Rationing Plan at I.A.13).

The plan outlines compliance measures, including regular monitoring, random inspections, and audits and provides that, if an outside audit of an outfitter is necessary and that audit uncovers errors in bookkeeping, records, and/or payments to the AHRA, the audited outfitter will be assessed the cost of the audit as well as any applicable additional assessments and penalties, but if no discrepancies are discovered, the audit's cost may be spread among all outfitters (Rationing Plan at I.A.14). Monetary fees will be assessed under the plan for each person and boat over rationing limits and repeat offenders may have their permits cancelled (Rationing Plan at I.A.15). To aid in verification of each company's use, the plan requires boats to be clearly marked, with the company's identity visible from either side of the boat (Rationing Plan at I.A.16-.17).

Under section I.A.18 of the rationing plan, although 2 consecutive years of nonuse on the entire river will result in the loss of outfitter's special use concession boating permit, an outfitter may make a written declaration of nonuse for the succeeding season no more than once in 3 years, and the rationed days in the year of nonuse will not be subject to recalculation. Those unused rationed days will be made available to other outfitters by dividing the number of boats available by the number of interested outfitters with use in that subsection and awarding each outfitter that number of boats. A lottery will be held should the number of boats per outfitter be less than one or a fraction of a boat. This method, the plan explains, which insures the utilization of the full capacity of the river section over a period of time but does not grant historic use to successful lottery winners of these days, protects the business investment of smaller outfitters particularly susceptible to the occurrence of significant personal events affecting their ability to conduct business while allowing the use of any available user days by other outfitters. The plan similarly provides that, until the earlier of January 1998 or the time the number of permits drops below 45, boat user days which return to the AHRA due to permit cancellations will be held in a common pool for the respective subsections involved and made available to outfitters having use in the subsection, with no historic use accruing to the outfitters receiving the additional boat user days (Rationing Plan at I.A.19).

Any increased operation costs created by plan implementation will be paid for by additional outfitter fees, the plan explains, since the costs attached to this new AHRA responsibility must be reimbursed by the program itself (Rationing Plan at I.A.20). The plan also establishes a cap of 45 commercial permits, to be attained through attrition, but authorizes an exception of up to 5 additional permits for commercial activity in one underutilized segment of the AHRA (Rationing Plan at I.B). This commercial permit cap and the plan provision retaining BLM's current permit transfer policy (Rationing Plan at II) remain subject to continuing monitoring, analysis, and possible future modification. See June 30, 1993, Rationing Plan Approval Decision at Unnumbered Page 2.

Horowitz appealed the approval decision and rationing plan directly to the Board. River Runners, however, first filed objections to the plan with BLM and DPOR. ^{5/} River Runners opposed the implementation of the rationing plan on the grounds that it restricted interstate commerce in violation of the Commerce Clause of the United States Constitution, that it violated the equal protection clause of the Fourteenth Amendment of the United States Constitution and the due process of the State constitution, that issuance of the plan during the height of the rafting season prevented busy outfitters from objecting to the plan, that the rafting user fees were being improperly utilized for purposes other than those which would benefit the rafting industry, that DPOR had no authority to regulate the surface of the Arkansas River, and that the plan infringed upon the rights of private landowners.

In a decision dated August 13, 1993, the BLM Canon City District Manager and DPOR South Region Manager (Managers) rejected River Runners' objections, finding that the agencies were not the proper forum for deciding constitutional issues and that, in any event, the plan did not regulate or discriminate against interstate commerce in violation of the Commerce Clause nor did it deny River Runners equal protection or due process since it conformed to the directives of the ARRMP, derived from careful thought and considerable public input, and affected all outfitters equally. While the Managers acknowledged that the timing of plan issuance might have been inconvenient, they considered this objection to have no legal basis. They further concluded that the user fees collected for implementation of the plan would properly be used for the purposes stated in the plan. The Managers dismissed River Runners' challenge to DPOR's power to manage the AHRA, citing the Colorado state legislature's 1989 enactment of the Arkansas River Recreation Act, Col. Rev. Stat. §§ 33-12.5-101 through 105 (1993 Cum. Supp.), as granting DPOR the authority to management recreational and commercial use of the upper Arkansas River. River Runners appealed this decision to the Board.

^{5/} Although River Runners directed its objections to BLM and DPOR, its submission should have been treated as an appeal to the Board. See 43 CFR 1610.5-3(b).

In his appeal, Horowitz contends that the plan does not adequately address the applicable criteria, is vague, open-ended and not conducive to the spirit of fair competition, and, if implemented, will ultimately force him out of business (Appeal at 1). Specifically, he objects to the base allocation calculation set forth in section I.A.4 of the plan, arguing that the averaging and equal reduction method of determining initial use allocation creates excessive and undue economic hardship for his small company because that equation does not consider economic variables or company size. He maintains that it is unfair that his company, with its small share of capacity and historic use, will be subject to the same rationing calculations as the large outfitters, with their vast amounts of historic use, who created the overuse problem and possess the resources to survive rationing. He suggests that a fair approach would be a proportional reduction based on performance, contribution to overcapacity, or noncontribution to overusage (Appeal at 2). Horowitz claims that the allocation methodology will unduly reduce and adversely affect his chances to compete and continue operations since any loss of the little historic use he has earned will render his business unprofitable (Appeal at 3).

Horowitz disputes the redistribution procedures outlined in section I.A.5 of the plan, asserting that the 3-year recalculation cycle, the rounding off (as opposed to rounding up) method, and the 80-percent rule "are prerequisites to redistribution that creates [sic] excessive and undue economic hardship" for his company (Appeal at 4). All these strategies, Horowitz submits, will unfairly benefit large outfitters to the detriment of his small company (Appeal at 4-5). Horowitz also opposes counting part day trips as whole days as required by section I.A.7 of the plan, arguing this provision is unfair and adversely impacts his company's established and prospective clientele because it will cause him to raise his prices for both half and full day trips and will eventually force him to eliminate lucrative part day trips entirely (Appeal at 7). Horowitz further contends that counting one-man designated water craft such as kayaks, canoes, and inflatable kayaks as two-man crafts, as mandated by section I.A.8 of the plan, artificially increases people counts; that requiring a company's people/boat numbers in the year that days reach capacity to be within 80 percent of the outfitter's historic people/boat average to prevent reduction of that company's number of boats on that day limits growth; and that preventing outfitters from interchanging numbers of people between types of boats adversely affects his operation since, while he has kayakers included in his historic use, there is no guarantee that the market will continue to request kayaking as opposed to rafting (Appeal at 8).

Horowitz complains that use of the word "may" in the statement in section I.A.9 of the plan that "[r]ationing may be discontinued * * *" is ambiguous since it implies that rationing might continue indefinitely and asserts that the lack of a definitive rule places undue hardship on his company while favoring outfitters who can benefit from indecision (Appeal at 9). He also objects to the suggestion in section I.A.13 that the sharing plan, which enables his company to take advantage of the generosity of others, might be too complicated and unworkable and requests that this

provision remain in the plan and "that it be revisited to make it work" (Appeal at 10). Finally, Horowitz argues that if his company is subject to an audit in accordance with section I.A.14 of the plan, he should only be assessed proportionately due to the costliness of such extended audits and the adverse impact the potential assessment could have on his operations (Appeal at 11).

In its statement of reasons (SOR), 6/ River Runners reiterates its contentions that:

A. The Rationing Plan is an impermissible burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

B. The Rationing Plan violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the Due Process Clause of the Colorado Constitution because the Rationing Plan is not rationally related to the protection of the resource that it seeks to protect and because the Plan has a discriminatory effect of River Runners, Ltd.

C. The user fees generated by the rafting industry are used for purposes other than that which directly benefit the rafting industry.

D. The BLM and DPOR do not have sufficient authority to implement the Rationing Plan.

E. The Rationing Plan diminishes the rights of private property owners along the Arkansas River.

(SOR at 2).

Specifically, River Runners asserts that implementation of the plan would place an impermissible burden on interstate commerce in violation of the Commerce Clause, United States Constitution article I, section 8, clause 3, because commercial rafting is a service in interstate commerce and limiting the number of rafts River Runners can launch limits the number of out-of-state customers. Not only is the plan's onus on interstate commerce excessive in relation to the local interests promoted by it, but River Runners avers that Congress has not authorized the State of Colorado to restrict interstate commerce in this manner (Petition for Stay (Petition) at 4-5; Objection to Rationing Plan (Objection) at 1-2).

6/ River Runners' SOR summarizes the issues raised in its objection to the rationing plan and in its petition for stay, both of which it incorporates by reference. The Board denied the stay request by order dated Oct. 28, 1993.

The plan runs afoul of both the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the Due Process Clause of the State's constitution, River Runners maintains, because the plan is not rationally related to resource protection and has a discriminatory effect on the company (Petition at 5-6; Objection at 2-3). According to River Runners, the plan's failure to establish that it is rationally related to the protection of the identified resources stems from the lack of studies in the ARRMP establishing a relationship between the number of rafts traveling the river and the perceived impacts; showing that safety concerns increase when more rafts are on the river; documenting the need for 20 percent less use on the weekdays; and supporting the distinction between commercial and private rafts (Petition at 5-6; Objection at 2-3). River Runners further contends that the plan has a discriminatory effect because the financial loss will be greater for a large company such as itself which will have greater numbers of rafts cut by the plan, because the lottery system used to allocate available space on rationed days does not recognize that a large company has a greater potential for growth than a small company, and because the plan thwarts River Runners' normal practice of overbooking to offset "no shows," its ability to book and deal with large groups, and its system of taking reservations in advance of notice from the AHRA of a rationed day (Petition at 6-7; Objection at 3-4).

River Runners objects to the AHRA's use of the large amount of user fees generated by the rafting industry, claiming that the fees are being utilized for purposes other than those directly benefitting the rafting industry. Because the fees have not been employed for their stated purpose, River Runners contends that the ARRMP and the rationing plan are patently unjust (Petition at 7; Objection at 4).

Finally, River Runners argues that BLM and DPOR "do not have sufficient authority to implement the Rationing Plan particularly where it diminishes the rights of property owners along the Arkansas River" (Petition at 7). River Runners asserts that, under Colorado law, ownership of the surface of the nonnavigable Arkansas River consists of a checkerboard of public and private interests and notes that holdings throughout the AHRA are largely private although BLM is the single largest landowner (Petition at 7; Objection at 4). According to River Runners, even though the CMA may have given the State some authority to manage the river as it traverses BLM land, no authority exists granting the State the power to administer private lands along the river, and any private landowner along the river has the right to limit or curtail access across their portion of the river (Petition at 7-8). Reliance on the Arkansas River Recreation Act, Col. Rev. Stat. §§ 33-12.5-101 through 105 (1993 Cum. Supp.), as authority for DPOR's management of the AHRA is misplaced, River Runners maintains, because that statute specifically states that the rights of adjacent property owners should not be curtailed (Petition at 8). River Runners claims that the proposed administration of the Arkansas River "specifically usurps" the property interests of David Smith

of River Runners who owns several portions of land along the river used by the outfitter as put-ins and take-outs and contravenes the express language of the Act (Petition at 8).

In its answer, ^{7/} BLM contends that neither appellant has shown that the rationing plan for commercial boating use in the AHRA is arbitrary, capricious, or an abuse of discretion. To the contrary, BLM asserts that there is a substantial basis for the plan and that, despite each appellant's claim that it will be treated unfairly, Horowitz because his company is small and River Runners because it is large, the plan treats all permit holders equally, adding that BLM has no obligation too manage the issuance of rafting permits so as to ensure the economic viability of either appellant (Answer at 5). While recognizing that the Board is not the proper forum to decide constitutional issues, BLM nevertheless avers that River Runners' commerce clause and equal protection arguments are meritless because they disregard the joint Federal-State nature of the action and that the company's equal protection and due process arguments also fail due to River Runners' inability to show that the plan classifies affected persons in a manner not rationally related to legitimate government objectives (Answer at 5-6). BLM finds River Runners' allegation of improper use of rafting user fees not only irrelevant, but, unsubstantiated as it is, undeserving of response (Answer at 6). BLM further discounts River Runners' challenge to the State's authority to manage the surface of the river as it crosses private lands and points out that River Runners has not seriously challenged BLM's authority to issue the plan (Answer at 7).

BLM asserts that all the issues raised by Horowitz were extensively addressed during the development of the plan by both the rafting industry and the public, noting that Horowitz was a member of the outfitters committee assisting BLM and DPOR in the creation of the plan. BLM maintains that the formulation of the rationing plan followed the guidelines of the ARRMP and represents the best combination of options meeting the designated criteria in the extremely complex management setting of the AHRA. While recognizing that not all points of the plan affect each outfitter identically, BLM contends that the plan treats all outfitters in the same manner and degree and, thus, does not favor any one company or group of companies (Response to Horowitz Appeal at 1).

BLM denies that it is unfair to subject Horowitz to the same rationing calculations as other outfitters or to use equal reductions for all outfitters, rejecting Horowitz' implicit request that his company be given preferential treatment (Response to Horowitz Appeal at 2-3). BLM asserts that Horowitz' claim that the plan would have a devastating impact on his company is greatly exaggerated since only a few days in designated sections

^{7/} BLM's consolidated answer consists of legal arguments presented by the Solicitor's Office (Answer) and responses to the specific issues raised by appellants prepared by BLM on behalf of itself and DPOR, as managers of the AHRA (Response).

of the river will be rationed and observes that the 20-percent weekday reduction in certain sections of the river challenged by Horowitz conforms to the directives of the ARRMP (Response to Horowitz Appeal at 2). Horowitz' objections to various aspects of the redistribution procedures are meritless, BLM avers, explaining that the 3-year period affords suitable time in which to analyze the impacts of rationing because it minimizes the effects of occasional adverse circumstances and provides outfitters sufficient time to adjust to the new operating constraints created by rationing; that the 80-percent rule takes into account the variables affecting a company's use of its allocation; and that use of rounding off is a well-established and completely fair method for redistribution (Response to Horowitz Appeal at 3-4). BLM submits that the redistribution method outlined in the plan, the basic formula for which was suggested by Horowitz, gives small companies, as well as all others, a chance to grow on specific rationed days and is fair to all concerned (Response to Horowitz Appeal at 3-4).

BLM discounts Horowitz's opposition to counting any part of a day as a whole day, stating that 43 CFR 8372.0-5(h) defines a user day to include partial days as well as whole calendar days and that using other methods to ration the various types of trips had been considered and rejected as exceptionally difficult and essentially unmanageable (Response to Horowitz Appeal at 4). The plan's enumeration of 8 people as the number of users per raft and two people as the number of users per kayak, inflatable kayak, two-seat cataraft, and canoe for rationing purposes, BLM explains, was designed to prevent speculation and dramatic increases in the number of people on the river as were the use of the 80-percent figure for the people/boat average and the prohibition of interchanging the types of crafts used by an outfitter on a rationed day (Response to Horowitz Appeal at 5).

BLM defends the use of the word "may" in the statement about the discontinuance of rationing on the ground that this language comes directly from the ARRMP and thus is not appealable and reflects the fact that not all reductions in river usage will be attributable to factors justifying the cancellation of rationing (Response to Horowitz Appeal at 5). Horowitz' appeal of the suggestion that sharing might be unworkable is premature, BLM asserts, since there currently is no proposal to remove sharing from the plan (Response to Horowitz Appeal at 5). Finally, BLM contends that the audit payment provisions of the plan are equitable since only outfitters failing to correct identified discrepancies will be subject to intensive audits and the costs of the audit, as well as any assessed fines, will be levied on the outfitter only if the audit proves the allegations (Response to Horowitz Appeal at 5-6).

[1] Pursuant to the joint management responsibilities delineated in the CMA, BLM and DPOR developed the challenged rationing plan to fulfill the directives of the ARRMP. The Board has held that a BLM management decision implementing a resource management plan (RMP) will be affirmed if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification

or reversal. Gerry Zamora, 125 IBLA 10, 14 (1992), and cases cited. A mere difference of opinion regarding proper management will not overcome an amply supported BLM management decision. Southern Utah Wilderness Alliance, 128 IBLA 382, 389 (1994); Oregon Shores Conservation Coalition, 83 IBLA 1, 6 (1984). Although the ARRMP is an amendment to the Royal Gorge MFP rather than an RMP, an MFP properly forms the basis for proposed actions until superseded by an RMP (see 43 CFR 1610.8(a)) and MFP amendments are governed by the same rules as RMP amendments. See 43 CFR 1610.8(a)(3)(ii). Thus, the standard of review applicable to decisions implementing RMP's also governs review of MFP implementation decisions.

The rationing plan for commercial boating use of the AHRA finds abundant support in the record. The ARRMP established the parameters for the rationing plan and cited the applicable criteria and possible allocation methods. To the extent Horowitz and River Runners now attempt to challenge the decisions made in the 1989 ARRMP, including the establishment of different carrying capacities for weekdays versus weekends and holidays and the use of collected fees, or the adequacy of the bases for the decisions, those objections are beyond the Board's jurisdiction, as well as untimely. The review procedures applicable to RMP's and amendments thereto, 43 CFR 1610.5-2, are equally applicable to MFP's and their amendments. Oregon Shores Conservation Coalition, *supra* at 2; Oregon Natural Resources Council, 78 IBLA 124, 127 (1983). Therefore, disputed ARRMP determinations should have been protested to the Director, BLM, by January 17, 1989, as indicated in the ARRMP, and may not now be heard by the Board.

River Runners' constitutional challenges similarly are not subject to review by the Board. It is well established that the Department of the Interior, as an agency of the executive branch of Government, is not the proper forum to consider constitutional challenges. Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994); Organized Sportsmen of Lassen County, 124 IBLA 325, 330 (1992). In any event, River Runners' assertion of equal protection violations appears misguided given that all outfitters are subject to the same allocation system. See Amerada Hess Corp., 128 IBLA 94, 98 (1993).

We further reject River Runners' challenge to DPOR's authority to manage activities on the Arkansas River. Although the outfitter relies on the court's decision in People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979), as support for its claim that, under common law, adjacent riparian landowners hold title to land under nonnavigable streams, that decision also explicitly notes that "it is within the competence of the General Assembly to modify rules of common law within constitutional parameters," *id.*, and suggests that the legislative process is the proper method to achieve the goal of accommodating the increasing demand for recreational use on the waters of the State. *Id.* at 1029. The Arkansas River Recreational Act, Col. Rev. Stat. §§ 33-12.5-101 through 105 (1993 Cum. Supp.), embodies the State of Colorado's policy determination that the State should regulate

recreational use of the river. See Col. Rev. Stat. § 33-12.5-102 (1993 Cum. Supp.). The private rights preserved by the statute involve private landowner rights along the river and water rights, not rights over the surface of the water. See Col. Rev. Stat. §§ 33-12.5-102, 33-12.5-104 (1993 Cum. Supp.). Thus, we find no impediment to DPOR's management of the river in cooperation with BLM.

The bulk of Horowitz' and River Runners' objections to the rationing plan consists simply of differences of opinion with BLM over the proper allocation of rationed use, with Horowitz claiming that he should receive special treatment because his company is small and River Runners seeking preferential handling because it is large. The record reveals that BLM and DPOR carefully considered the issues raised on appeal during the course of developing the rationing plan and conscientiously followed the mandates of the ARRMP and the directives of the BLM Manual and Handbook. The plan fairly and impartially apportions rationed use consistent with the applicable guidelines. Appellants' attempts to substitute their judgment for that of BLM and DPOR fall far short of demonstrating that BLM's judgment is unreasonable and should be overturned. See Southern Utah Wilderness Alliance, supra at 382. Thus, we find that the record contains plentiful support for the rationing plan and conclude that appellants' differences of opinion with the management determinations in the plan are insufficient to undermine the validity of the plan.

To the extent not specifically addressed herein, appellants' other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Will A. Irwin
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

